Supreme Court, U.S.
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No. 95-1185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FORT PECK ASSINIBOINE and SIOUX TRIBES,
Petitioner,

v.

LESLIE SCARLOTTE TUBRIDY and PATRICK TUBRIDY,
Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, the Fort Peck Assiniboine and Sioux Tribes (Tribes), seeks in this case to vindicate its governmental right—conferred by the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(a)—to have the Tribes' own courts determine the placement of two minor children who are enrolled tribal members. Section 1911(a) unmistakably grants tribal courts exclusive jurisdiction to determine custody of tribal members domiciled on the Reservation. And this Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), determined that domicile under the ICWA must be established by federal common law, and not as that term may be defined under state law. The Court in *Holyfield* also held that an Indian child's domicile under the ICWA follows the domicile of the mother, who in this case resided on the Fort Peck Reservation.

The Illinois Supreme Court's decision in this case denied the Tribes' right to jurisdiction established in the ICWA, and remanded the case to lower Illinois courts to decide the state law question of whether the mother had abandoned the children. Pet. App. at 14a-18a. It did so despite the express admonition of this Court in *Holyfield* that:

> [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.

490 U.S. at 53 (citation omitted).

Respondents grasp at the remand for determination of this state law issue—precluded as it is by *Holyfield*—as a straw to avoid this Court's review and enforcement of the federal law rights created by ICWA. Brief in Opp. at 4-9. Respondents argue that this Court lacks jurisdiction to hear the petition because the remand makes the judgment below less than "final" under 28 U.S.C. § 1257(a).

This Court has never applied finality in Section 1257 (a) "in such a mechanical fashion" as "to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 (1975). By contrast, *Cox Broadcasting* supports review:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action. . . ."

Id. at 482-483. *Accord: Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 55 (1989)(remand to lower state

courts); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 370 n.11 (1988) (remand to state administrative agency); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-180 (1988) (remand to state administrative agency); *see also Asarco, Inc. v. Kadish*, 490 U.S. 605, 612 (1989).

This standard is met here. The decision below determines the federal issue against the Tribes, and remands the case for further proceedings on a nonfederal issue. A decision now by this Court enforcing the Tribes' federal law rights "would be preclusive of any further litigation." *Cox Broadcasting Corp.*, 420 U.S. at 483. Moreover, since *Holyfield* already determines the substantive federal question and specifically concludes that "[state] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA. . .," *Holyfield*, 490 U.S. at 53—as the remand proposes to do—"a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting Corp.*, 420 U.S. at 483.

In these circumstances, this Court's jurisdiction is clear. This Court has always construed the finality requirement so as "not to cause . . . potentially irreparable injuries to be suffered." *Matthews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). Further delay of this four-year-old case as the tribal children grow to majority effectively throttles the protections of tribal judicial jurisdiction the ICWA provided.

CONCLUSION

The Court should either grant the petition or summarily reverse the decision of the Illinois Supreme Court for its refusal to follow *Holyfield*.

Respectfully submitted,

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